No. 195.
Brf of Pritchard for [illegible]
Filed Oct. 26, 1901.

Brief for Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible].

No. [illegible].

B. A. STOCKARD AND R. C. JONES, COMPOSING THE FIRM OF STOCKARD & JONES; J. H. McREYNOLDS, W. G. OEHMIG, T. M. CAROTHERS, AND J. H. ALLISON, PLAINTIFFS IN ERROR,

vs.

CLINT MORGAN AND J. N. McCUTCHEON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

STATEMENT, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR.

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COUNSEL FOR PLAINTIFFS IN ERROR.

(17,971)

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 195.

B. A. STOCKARD, *et al.*, *Plaintiffs in Error*, *vs.* CLINT MORGAN AND ANOTHER.	*In Error to Supreme Court of Tennessee.*

STATEMENT, ASSIGNMENT OF ERRORS, BRIEF, AND ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

There were five separate bills filed in the Chancery Court at Chattanooga, Tennessee, against the defendants in error, to enjoin the collection of privilege taxes alleged to be due the State of Tennessee and Hamilton County from the several complainants; but, by agreement, the five cases were consolidated and heard together.
Rec. pp. 2-5; 7.

The Chancellor was of opinion that the complainants were entitled to the relief sought, and decreed accordingly. (Rec. 17-18.) But upon appeal to the Supreme Court of Tennessee, the decree of the Chancellor was reversed, and it was decreed that complainants' several bills be dismissed.
Rec. pp. 41-42.

Thereupon the original complainants brought the case to this Court by writ of error.
Rec. pp. 42-46.

There was no controversy as to the facts; they were agreed to be substantially as follows:

The several plaintiffs in error, except J. H. McReynolds, had been carrying on business in Chattanooga, Hamilton County, Tennessee, since and including the year 1897; McReynolds had only carried on business there during the year 1900. They were separately engaged in the same business. As the representatives of firms or corporations which were residents and citizens of States other than Tennessee, plaintiffs in error solicited orders for goods from wholesale dealers doing business in Chattanooga. These orders for goods were sent by plaintiffs in error to their non-resident principals, who might accept or reject them. If an order was accepted, the goods were shipped by the non-resident principal to the local wholesale dealer. Up to the time of the sale, the goods, in every case, belonged to the foreign principal, and were shipped into the State of Tennessee from another State.
Rec. p. 12

At the end of every month, or at other stated periods, the several plaintiffs in error were paid commissions by their foreign principals for goods previously sold on accepted orders; no commissions were paid on orders taken by the plaintiffs in error and rejected by their foreign principals. No plaintiff in error received for his services any compensation or salary from any local dealer or any resident of Tennessee, nor did he assume to represent, or represent, any resident of Tennessee, or negotiate any sale of goods between residents of Tennessee. All goods were sold for shipment and delivery from another State to buyers in Tennessee.

Rec. p. 12.

The several plaintiffs in error have offices or "head-quarters" in Chattanooga, Tennessee, where they keep samples of goods, etc.; but they travel around on foot "drumming the trade", or soliciting orders for goods as above stated. Their principals are certain known foreign firms or corporations doing business in other States, and the plaintiffs in error do not represent the trade or dealers generally.

Rec. p. 12.

The defendants in error contend that the several plaintiffs in error are liable to the State of Tennessee and Hamilton County for privilege taxes as "merchandise brokers" under the statutes of Tennessee, as follows:

That J. H. McReynolds should pay a privilege tax for 1900 of $20 to the State and $20 to the County;

That each of the other plaintiffs in error should pay to the State $20 per year for 1897, 1898, 1899 and 1900, and like sums to Hamilton County for those years;

That the several plaintiffs in error are also liable for penalties, costs and attorneys' fees, if they are liable for such taxes.

The contention of the plaintiffs in error is that they are engaged exclusively in interstate commerce and are not bound for such privilege taxes; that the revenue acts of Tennessee taxing "merchandise brokers" were not designed to embrace them, and that if they do apply to them, the acts are inoperative and void.

The statutes of the State of Tennessee under which it is claimed the plaintiffs in error are liable for privilege taxes, so far as they relate to this matter, are as follows:

An act entitled "An Act to provide Revenue for the State of Tennessee and the Counties thereof," being Chapter 2, Acts 1897, contains the following provisions:

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the taxes on every $100 worth of property shall be 40 cents for the year 1897, and for every subsequent year thereafter, 25 cents of which shall be for State purposes and 15 cents for school purposes.

"SEC. 2. *Be it further enacted*, That the several county courts of this State be and they are hereby authorized and empowered to levy an annual county tax on every $100 worth of taxable property not exceeding the State tax and exclusive of the tax for public roads and pikes and schools and interest on county debts and other

special purposes, and each county and municipality in this State is hereby authorized and empowered to levy a privilege tax upon merchants and other avocations named in this Act and declared to be privileges, not exceeding in amount that levied by the State for State purposes.

"SEC. 3. *Be it further enacted*, That all merchants shall pay an *ad valorem* tax upon the average capital invested by them in their business of 40 cents on the $100, 25 cents of which shall be for State purposes and 15 cents of which shall be for school purposes; and the privilege tax of 15 cents on each $100 worth of taxable property, 7½ cents of which shall be for school purposes and 7½ cents for State purposes: *Provided*, that such privilege tax without regard to the length of time they do business shall in no case be less than $5, which $5 is to be paid when the license is taken out; and in case of those whose privilege tax amounts to more than $5, the $5 paid shall be a credit when the balance of the taxes is paid.

SEC. 4. *Be it further enacted*, That the rate of taxation on the following privileges shall be as follows, and the following are hereby declared to be privileges:

* * * * * * * * *

"*Brokers, Merchandise.*

"In cities, towns, and taxing districts of 20,000 inhabitants or over, each, per annum $15 00
Of from 10,000 to 20,000, each, per annum 10 00
All of those under 10,000, each, per annum .... 5 00"
Acts 1897, Ch. 2, pp. 50-51, 52.

An act entitled "An Act to provide Revenue for State, County, and Municipal Purposes," being Chapter 432, Acts 1899, contains the following provisions:

"SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That the taxes on every $100 worth of property shall be 50 cents for the year 1899, and for every subsequent year thereafter, 35 cents of which shall be for State purposes and 15 cents for school purposes. That there shall be levied and collected a collateral inheritance tax as provided for in Chapter 174 of the Acts of 1893.

"SEC. 2. *Be it further enacted*, That the several county courts of this State be, and they are hereby, authorized and empowered to levy an annual county tax on every $100 worth of taxable property not exceeding 30 cents upon the hundred dollars worth of property, and exclusive of the tax for public roads and pikes and schools and interest on public debts, and other special purposes. And each county and municipality in this State is hereby authorized and empowered to levy a privilege tax upon merchants and such other avocations, occupations or businesses as are named in this act and declared to be privileges, not exceeding in amount that levied by the State for State purposes. The imposition of a privilege tax under this act shall not be construed as a release or exemption from an ad valorem tax unless otherwise expressly pro-

vided. Nor shall this act be construed as repealing any special act heretofore passed imposing a privilege tax.

"SEC. 3. *Be it further enacted*, That all merchants shall pay an ad valorem tax upon the average capital invested by them in their business of 50 cents on the $100; 35 cents of which shall be for State purposes, and 15 cents shall be for school purposes, and a privilege tax of 15 cents on each $100 worth of taxable property, 7½ cents of which shall be for school purposes, and 7½ cents for State purposes: Provided, that such privilege tax, without regard to the length of time they do business, shall in no case be less than $5, which $5 is to be paid when the license is taken out, and in case of those whose privilege tax amounts to more than $5, the $5 paid shall be a credit when the balance of the tax is paid; Provided further, That said $5 shall be equally divided between the State and counties.

"SEC. 4. *Be it further enacted*, That each vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege, and the rate of taxation on such privilege shall be as hereinafter fixed, which privilege tax shall be paid to the county court clerk as provided by law for the collection of revenue.

* * * * * * * * *

"*Brokers—Merchandise.*

"Which shall include, when the sale is made in the State, all sellers of merchandise to consumers upon orders or samples, and also all agents engaged in such business.

"In cities, towns, and taxing districts of 50,000 inhabitants or over, each, per annum	$30 00
"In cities, towns, and taxing districts of 20,000 to 50,000 inhabitants, each, per annum	20 00
"In cities, towns, and taxing districts of 10,000 to 20,000 inhabitants, each, per annum	15 00
"In cities, towns, and taxing districts of less than 10,000 inhabitants, each, per annum	7 50"

Acts 1899, Ch. 432, pp. 1010-1011, 1016.

The Supreme Court of Tennessee decided that the plaintiffs in error are merchandise brokers within the meaning of the foregoing acts, and that the acts are not obnoxious to the interstate commerce clause of the Federal Constitution. This decision was placed upon the ground that the thing taxed is the business of merchandise brokerage, and not the business of the foreign principal employing the local agent.

Rec. pp. 40-41.

And, as before stated, there was decree accordingly, denying the relief sought and dismissing the bills with costs.

Rec. p. 41.

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign the following errors:

I.

That the Supreme Court of Tennessee erred in finding and decreeing that the plaintiffs in error were not entitled to the relief sought in and by their said bills of complaint, and in dismissing their bills with costs.

II.

That the said Court erred in finding and decreeing that the plaintiffs in error were liable for the privilege taxes assessed against merchandise brokers under the statutes of the State of Tennessee, and were not protected therefrom by clause 3, Sec. 8, Art. I., of the Constitution of the United States.

III.

That the Court erred in finding and adjudging that the several plaintiffs in error were not engaged in interstate commerce within the meaning of said clause of the Constitution of the United States, so as to be protected thereby from privilege taxation under the statutes of the State of Tennessee.

IV.

That in the Chancery Court held at Chattanooga, in Hamilton County, Tennessee, being the court which had and exercised original jurisdiction of the said several suits consolidated under the style of Stockard & Jones vs. Clint Morgan and others, said several complainants, being the plaintiffs in error herein, specifically set up and claimed that they were engaged exclusively in commerce between the States, and that they were entitled to immunity from taxation on such business under the statutes and revenue laws of the State of Tennessee, and questioned the validity of the statutes of Tennessee imposing or purporting to impose any tax upon the privilege of their said business, and questioned the validity of the authority exercised under such statutes upon the ground of their being repugnant to the Constitution and laws of the United States upon the subject of commerce between the States, and the decision of the said Chancery Court at Chattanooga, in Hamilton County, Tennessee, was against the validity of said statutes and the authority exercised thereunder so far as they affected said complainants and in favor of the immunity claimed by appellants; but upon appeal to the said Supreme Court of the State of Tennessee, the decision of the Supreme Court was in favor of the validity of the said statutes and the authority exercised thereunder and against the privilege and immunity claimed by the said complainants under the said Constitution and laws of the United States, and particularly under the commerce clause of said Constitution; and plaintiffs in error say that the said Supreme Court erred in deciding in favor of the validity of said statutes of the State of Tennessee and of the authority exercised thereunder and against the rights, privileges, and immunities so set up and claimed by plaintiffs in error under the aforesaid provisions of the Constitution of the United States.

BRIEF.

1. The Tennessee statutes 1897, ch. 2, and 1899, ch. 432, do not embrace the plaintiffs in error:

(*a*) While the Tennessee Act 1897, ch. 2, imposes a tax on "merchandise brokers" generally, it contains no language necessarily embracing or expressly taxing such merchandise brokers as are engaged exclusively in interstate commerce. It should be construed to tax only those subject to State taxation.

[Paragraph (*a*) above applies to the Act of 1899, ch. 432, as well as to the Act of 1897, ch. 2.]

(*b*) The Tennessee Act 1899, ch. 432, imposes a tax on "sellers of merchandise to consumers, upon orders or samples, and on all agents engaged in such busines, where the sale is made in the State." The plaintiffs in error do not sell to consumers, and they do not complete sales of goods; they take orders from local wholesale merchants, but their foreign principals may accept or reject any order; if an order is accepted the principals ship the goods from another State to the merchant in Tennessee, and the local merchant sells to consumers and others.

2. But if the Tennessee statutes 1897, ch. 2, and 1899, ch. 432, do include and tax the plaintiffs in error, the acts are unconstitutional to that extent, because they interfere with and impose a burden on commerce among the States.

(*a*) The negotiation of the sale of goods which are in another State for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce, and a State cannot require a license, or exact a tax, as a condition precedent to negotiating the sale.

Robbins *vs.* Shelby County Taxing District, 120 U. S. 489;
Leloup *vs.* Port of Mobile, 127 U. S. 640.

(*b*) The exacting of a license tax as a condition to doing any particular business is a tax on the occupation, and a tax on the occupation of doing the business is a tax on the business.

Brown *vs.* Maryland, 12 Wheat. 419;
Welton *vs.* Missouri, 91 U. S. 275;
Robbins *vs.* Shelby Co. Tax. Dist., 120 U. S. 489;
Leloup *vs.* Port of Mobile, 127 U. S. 640;
McCall *vs.* California, 136 U. S. 104;
Brennan *vs.* City of Titusville, 153 U. S. 269.

(*c*) This case presents a very different question from that presented in *Ficklen vs. Shelby County Taxing District*, 145 U. S. 1. These plaintiffs in error have not taken out licenses, and have not done a general brokerage business. They have acted as agents for certain non-resident principals, and have done no local or general business, and are not subject to State taxation.

See 145 U. S. 24;
Brennan *vs.* City of Titusville, 153 U. S. 289, 306.

(*d*) In the case at bar the Supreme Court of Tennessee followed

the Alabama Supreme Court in holding that a similar statute applied to a precisely similar state of facts, and held that the privilege tax in question was imposed upon the plaintiffs in error. But the Alabama court held further that the statute was unconstitutional because it violated the commerce clause of the Federal Constitution. The Tennessee court, on the contrary, held the statute valid because it was a tax on the *occupation of merchandise broker*. This we submit was error.

Stratford *vs.* City Council of Montgomery, 110 Ala. 619.
Cases cited *supra*, 2 *b*.

(*e*) That plaintiffs in error reside in Hamilton County, Tennessee, and have offices or headquarters for the convenience of their business, are immaterial circumstances, not inconsistent with the fact that their business is exclusively interstate commerce.

Leloup *vs.* Port of Mobile, 127 U. S. 640;
McCall *vs.* San Francisco, 136 U. S. 104;
Norfolk & Western R. R. Co. *vs.* Pennsylvania, 136 U. S. 114;
Crutcher *vs.* Kentucky, 141 U. S. 47;
Brown *vs.* Maryland, 12 Wheat. 419;
Welton *vs.* Missouri, 91 U. S. 275;
Brennan *vs.* City of Titusville, 153 U. S. 289.

ARGUMENT.

Conceding that the plaintiffs in error are "merchandise brokers," the question remains whether the Tennessee statutes were intended to embrace *all* merchandise brokers, or only such as were not *engaged in interstate commerce; and whether the distinction* taken by the Tennessee Supreme Court between a tax on the vocation or business of merchandise brokerage and a tax on the "business of the foreign principal employing the local agent," is sound. In other words, if the Tennessee statutes do embrace the plaintiffs in error, does the distinction indicated by the State Supreme Court relieve the statutes of the objection that they are obnoxious to the commerce clause of the Federal Constitution?

It would perhaps serve no purpose to argue that the acts in question were not intended to embrace and tax the plaintiffs in error. The Supreme Court of Tennessee have said the acts do apply to them; that the tax is imposed upon them. The question left is whether the law is valid.

Still, it may be worth while to call attention to the fact that the act of 1897, ch. 2, contains no reference to the particular character of the business of the "merchandise brokers" upon whom it imposes the privilege tax. It provides that certain "avocations named in the act and declared to be privileges," shall be subjects of taxation, (sec. 2), and proceeds to provide that "merchandise brokers" shall pay privilege taxes, graduated by the population of the cities or towns in which they do business, (sec. 4), but the act makes no reference to the character of the business intended to be taxed, whether foreign or domestic.

The act of 1899, ch. 432, is to the same effect, substantially, except the following marked distinction: It declares that the term "merchandise brokers" "shall include, when the sale is made in this State, all sellers of merchandise to consumers upon orders or samples, and also all agents engaged in such business." (Sec. 4.)

It would seem clear that in order to hold that this act applies to the business of a "merchandise broker," it would have to appear (1) that the *sale* was made in the State of Tennessee, and (2) that the sale was to a *consumer* upon order or sample. We think it may fairly be controverted that the sales of merchandise by plaintiffs in error were made and completed in Tennessee. The broker, according to the agreed state of facts, merely solicited and received the order and transmitted it to his principal in another State for acceptance or rejection; and, if accepted, the principal "made the sale" and shipped the goods to the local wholesale dealer. No sales were made to "consumers upon orders or samples," or otherwise.

The added language of the act that "all agents engaged in such business" shall be subject to the tax, does not enlarge the class of business to which the act is applicable. To be subject to the tax the "agent" must be "engaged in such business," *i. e.*, the business of "selling merchandise to consumers upon orders or samples." The act taxes the "seller" and the "agent," but taxes no seller or agent unless engaged in the business of selling merchandise directly to consumers. And none of the plaintiffs in error were

sellers or agents for sellers of merchandise to consumers.

It would seem, therefore, that the act of 1899, ch. 432, can have no application to the plaintiffs in error. The original act of 1897 contains no limiting or explanatory language and is broad enough to cover any sale of goods in one State for shipment and delivery in another, *no matter how clearly a transaction of interstate commerce*, unless, in construing the statute we adopt that construction which will save it, and apply it only to proper subjects of State taxation, rather than a construction which will make it obnoxious to the commerce clause of the Constitution.

But passing this question, and treating it as conceded that the State of Tennessee has undertaken to levy this privilege tax upon the plaintiffs in error and others situated as the agreed state of facts shows them to be, we respectfully insist that the effort to tax them is void, and that the attempt to save the statutes from the charge of unconstitutionality by saying that they do not discriminate between foreign and domestic business, but tax the occupation of merchandise brokerage and not the business of those employing, whether foreign or domestic, is unsound and ineffectual.

The words of the statute are hardly susceptible of any construction that would make the suggested defense against unconstitutionality available. The act of 1897 simply taxes "*merchandise brokers*," saying nothing about "sellers" or "agents." The act of 1899 in terms applies to persons engaged in merchandise brokerage, and taxes "sellers" and "agents." The act of 1897 simply taxes the "privilege." The act of 1899 taxes as privileges "each vocation, occupation and business" thereinafter named, declaring them to be privileges.

The Supreme Court of Tennessee says "the law does not discriminate;" that it taxes the occupation, or business of merchandise brokerage, and does not confine the broker to foreign or domestic principals.

Rec. pp. 40–41.

That "the law does not discriminate" is no answer to our objection. It ought to discriminate: if it fail to do so, it is void so far as it invades the domain of interstate commerce. Commerce among the States cannot be taxed at all by a State, even though the same tax be laid on commerce carried on wholly within the State.

Robbins *vs.* Shelby County Taxing District, 120 U. S. 489.

We do not understand it to be denied, or at this day to be open for discussion, that the negotiation by sample in one State, of the sale of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce.

Robbins *vs.* Shelby County Taxing District, 120 U. S. 489;
Corson *vs.* Maryland, 120 U. S. 502;
Leloup *vs.* Port of Mobile, 127 U. S. 640;
Barne *vs.* Burnside, 121 U. S. 186;

Asher *vs.* Texas, 128 U. S. 129;
Leisy *vs.* Hardin, 135 U. S. 100;
Brennan *vs.* City of Titusville, 153 U. S. 289;
Ficklen *vs.* Shelby County Taxing District, 145 U. S. 1.

But it is said that the tax in question is laid upon the localized business of merchandise brokers in Tennessee, and that the validity of the tax is not affected by the circumstance that these particular brokers only had foreign principals.

This, we submit, is a begging of the question. If the business done by the broker is interstate commerce, the circumstance that the broker only conducts his business in one town, and the other circumstance that he has an office, are alike immaterial.

The unsoundness of the proposition that the exacting of a tax upon an occupation or business is not an interference with interstate commerce, if the business conducted be itself interstate commerce, has frequently been exposed by this court.

In the leading case of *Brown vs. Maryland*, 12 Wheat. 419, it was contended, substantially as decided by the Supreme Court of Tennessee in this case, that a statute of the State of Maryland did not impose the tax upon the occupation or trade of the importer, but upon the occupation of selling foreign goods after they had been imported; that "the tax was upon the profession or trade of the party when that trade is carried on within the State, and laid upon the same principle with the usual taxes on retailers, on innkeepers, on hawkers and peddlers, or upon any other trade exercised within the State."

But this Court, speaking through Mr. Chief Justice Marshall, answered this contention as follows:

"It is impossible to conceal from ourselves that this is varying the form without varying the substance. . . . All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself. It is true that the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it; so a tax on the occupation of an importer is in like manner a tax on importation. It must add to the price of the article and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself would be paid. This the State has not a right to do, because it is prohibited by the Constitution." 12 Wheat, 444.

Other cases are to the same effect. In *Welton vs. Missouri*, 91 U. S. 275, 278, this Court said:

"Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If once a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license of the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less

invalid because enforced through the form of a personal license.'

In *Leloup vs. Port of Mobile*, 127 U. S. 640, 645, this Court said: "Ordinary occupations are taxed in various ways, and in most cases legitimately taxed; but we fail to see how a State can tax a business occupation without taxing the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business."

To the same effect are the utterances of the Court in

McCall *vs.* California, 136 U. S. 104;
Brennan *vs.* City of Titusville, 153 U. S. 289.

And these cases have been followed by the Supreme Court of Tennessee in *State vs. Scott*, 98 Tenn. 254, which involved the validity of a statute imposing a tax on "persons other than photographers of this State soliciting pictures to be enlarged outside of the State." It was *held* (1) that the business mentioned in the statute was interstate commerce; (2) that although the tax was not laid on the business or the principals engaged in it, but only on the soliciting agents, yet it was in effect a tax upon the non-resident principals, and, hence a tax on their business; and (3) that this business being interstate commerce, the State had no power to put a burden upon it, or to regulate or interfere with it in any way, and therefore the statute was void.

These cases seem to effectually dispose of the point made in the opinion of the Supreme Court of Tennessee in this case, to the effect that the tax is upon the occupation of the agent, unless it can be shown that in some way this case differs from those cited, and that a tax may be laid upon the business of the broker who solicits orders for his foreign principal without affecting the business of the principal whose goods are the subject matter of the transaction. It is not conceivable how this can be true: the volume and value of the business of the foreign firm which sells only through the local agent must necessarily be diminished if the right of the agent to solicit orders be interfered with. And however the matter may be viewed, the result is the same: it is the business of the principal that ultimately bears the burden of the loss.

But it is said the broker may select his own principals: that the statute does not confine him to either foreign or domestic principals. This is true, and it would be a complete answer to the complaint of one who had secured the State's license to do a general brokerage business and had then elected to act only for foreign principals. He could not be heard to complain. That was the question presented to this Court in the case of *Ficklen vs. Shelby County Taxing District*, 145 U. S. 1. But the case now presented is very different. The plaintiffs in error have not taken the State's license to do a general brokerage business, and, after being authorized to act as agents for either foreign or domestic principals, elected to act for foreign principals only. They have not done a general brokerage business: they have not asked or been granted the State's permission to do it. They say that because their business is limited to certain foreign principals for whom alone they

solicit orders, and because they are engaged in interstate commerce exclusively, they do not need the State's permission to conduct that business, and that it will be time enough for the State to demand its tax when they seek permission to do a general brokerage business.

And in *Ficklen vs. Shelby County*, *supra*, this Court has recognized the distinction contended for by us. After holding that general merchandise brokers who had taken out licenses to do business could not enjoin the collection of license taxes on the ground that they had chosen to act for foreign principals only, the Court say,—

"What position complainants would have occupied if they had not undertaken to do a general commission business and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an entirely different question, which does not arise upon this record."

145 U. S. 24.

In the subsequent case of *Brennan vs. City of Titusville*, 153 U. S. 289, 306, this Court said that the *Ficklen* case, even on the facts it presents, was "near the boundary line of the State's power," and that it was not intended as a departure from the doctrine "so firmly established" by the authorities already cited. Explaining the *Ficklen* case, this Court said that the tax in that case was imposed for the privilege of doing a general merchandise business; that the complainants after obtaining licenses and giving bonds, and after availing themselves of the benefit of their licenses, refused to comply with their bond to account for and pay taxes on commissions, upon the ground that most of their commissions had been on sales of goods forwarded by non-resident principals. The Court further said:—

"It was held that the tax was an entirety, and was not affected by the variable and adventitious results of business from year to year. It could hardly be contended that if the license tax exacted in advance for the privilege of engaging in such business was a fixed sum, a party paying the tax could, on a failure to secure and do any business, recover the tax so paid, for the tax is not for the business done, but for the privilege of engaging in business. So, when the plaintiffs in that case applied for their licenses at the beginning of the year, they assumed the whole liability imposed by the State. That all of it was not paid at once did not affect the measure of liability. Suppose the tax, a fixed sum, had been payable one-half at the commencement and the other half at the close of the year, would it be thought that, having paid the first half at the commencement of the year, they could resist payment of the second half on the ground that half of their commissions were received on goods shipped from outside the State? In other words, the tax imposed was for the privilege of doing a general commission business within the State, and whatever were the results pecuniarily to the licensees, or the manner in which they carried on business, the fact remained unchanged that the State had, for a stipulated price, granted them this privilege. It was thought by a majority of the Court that to release them from the obligations of

their bonds on account of the accidental results of the year's business was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the State therefor. In the opinion in that case, by the Chief Justice, the authorities which are referred to in this opinion were cited, and the general rule was announced as is here stated. We only refer thus at length to that case to show the distinction between it and this case, and to notice that in the opinion was reaffirmed the proposition that 'no State can levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.'"

153 U. S. 307-308.

Even if, standing alone, the *Ficklen* case could be considered authority for the conclusion reached by the Supreme Court of Tennessee in the present case, it certainly cannot be so regarded when read in connection with the *Brennan* case.

Upon facts not distinguishable in any particular from the facts in this case, the Supreme Court of Alabama reached a conclusion directly opposite to that reached by the Supreme Court of Tennessee in the case at bar, upon the legal question involved.

We refer to the case of *Stratford vs. City Council of Montgomery*, 110 Ala. 619, and rely upon it as being in accord with the decisions of this Court and as directly supporting our contention. In the opinion in the case at bar, the Tennessee Court refer to the Alabama case as "a very discriminating application of the law in an almost precisely similar case." But the Tennessee Court proceed to say: "In the Alabama case cited, the Court shows very clearly the distinction between a mere agent of a foreign principal and a merchandise broker whose business is conducted on the line of sales for foreign and to domestic patrons. After drawing this distinction with great force and clearness, the Alabama Court holds that such brokers stand in the same non-taxable relation as do mere agents, and that a privilege tax on the exercise of such a business is a tax on interstate commerce. We do not think so. The law does not discriminate. The tax is on the privilege of doing such a business in the State without regard to the customers sought or principals represented."

Rec. p. 40.

This is the way in which the Alabama case is disposed of. No effort to meet its reasoning is made: the only reason assigned by the Tennessee Court for not following it is that the Court thinks the tax is on "the privilege of doing business"; but the authorities we have cited show that this, in the language of Chief Justice Marshall, is merely "varying the form without varying the substance."

It seems that while the Tennessee Court approve the Alabama decision as "a discriminating application of the law to an almost precisely similar case" and thus follow it to the extent of holding

that the statutes imposing the tax apply to merchandise brokers, they refuse to follow it in holding that the business done by the plaintiffs in error is interstate commerce, and that, therefore, the statutes are void so far as they seek to tax it.

Stratford vs. City Council of Montgomery, *supra*, presents the exact question now presented—the question which this Court said in the Ficklen case was "an entirely different" one from the question presented by the record in that case: and the Supreme Court of Alabama, recognizing the distinction which the Supreme Court of Tennessee refuse to recognize, hold that the different facts produce a different result, and that a merchandise broker engaged exclusively in interstate commerce is not subject to taxation. "His business may be general, so as to constitute him a broker, but it by no means follows that it requires he should take local business. He might confine himself to interstate business and still be a "broker," without becoming liable to the tax."

110 Ala. 619, 628.

And the Alabama Court very properly say that a judicial construction of the Federal Constitution being involved, the decisions of this Court are of controlling authority.

Ib.

We respectfully submit that the conclusion reached by the Alabama Court is the correct conclusion, and that the Supreme Court of Tennessee erred in reaching a different result.

Nothing can be predicated of the fact that the plaintiffs in error are all residents of Hamilton County, Tennessee: it is not a question of residence, but of business; and a resident may be engaged in interstate commerce as exclusively as a non-resident.

This Court has never treated the circumstance that the person engaged in interstate commerce was a citizen of the State in which he was engaged in business, as being at all material, or as excluding him from protection against illegal taxation.

In *Robbins vs. Shelby County Taxing District*, 120 U. S. 489, the plaintiff in error was a resident of another State, but no stress is laid on that fact, and the decision in no way depends upon it.

On the other hand, it is clearly inferable, although not expressly stated in all of them, that the plaintiffs in error in the following cases were residents of the States in which they did business:

Brown *vs.* Maryland, 12 Wheat. 419;
Welton *vs.* Missouri, 91 U. S. 275;
Leloup *vs.* Port of Mobile, 127 U. S. 640;
McCall *vs.* San Francisco, 136 U. S. 104;
Brennan *vs.* City of Titusville, 153 U. S. 289.

Neither does the fact that the several plaintiffs in error had offices or "headquarters," where they kept their samples and stationery, change the nature of their business. They kept no goods for sale.

In the following cases, among others that might be cited, it appears the plaintiffs in error kept offices in the States in which the tax was imposed.

Leloup *vs.* Port of Mobile, 127 U. S. 640;
McCall *vs.* California, 136 U. S. 104;
Norfolk & Western R. R. Co. *vs.* Pennsylvania, 136 U. S. 114;
Crutcher *vs.* Kentucky, 141 U. S. 47.

Respectfully submitted,

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